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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-911

INDUSTRIAL UNION DEPARTMENT, AFL-CIO, *Petitioner,*

v.

AMERICAN PETROLEUM INSTITUTE, *et al., Respondents.*

No. 78-1036

RAY MARSHALL, SECRETARY OF LABOR, *Petitioner,*

v.

AMERICAN PETROLEUM INSTITUTE, *et al., Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE CAPITAL LEGAL FOUNDATION AS AMICUS CURIAE

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BRIEF OF THE CAPITAL LEGAL FOUNDATION AS AMICUS CURIAE

INTEREST OF *AMICUS CURIAE* CAPITAL LEGAL FOUNDATION

The Capital Legal Foundation is a tax exempt, non-profit organization located in Washington, D.C. It was organized in 1977 to engage in non-partisan legal research, study and analysis for the benefit of the general public as to the effect of developing concepts of law on the nation's democratic institutions. The Foundation was also organized to provide legal representation, and

to assist other organizations in providing such representation, on matters of public interest at all levels of the judicial process. In pursuit of these objectives, the Foundation closely monitors the development of important regulatory actions by federal agencies, and participates in related litigation.

The Foundation believes that the failure of the Secretary of Labor to determine the benefits of the standard under review must not be condoned by this Court. In our brief, we show that the Secretary's determinations under the Occupational Safety and Health Act of 1970 ("the Act") are subject to judicial review under the substantial evidence test, since that standard is commanded by Section 6(f) of the Act and the pertinent legislative history. We then show that the Secretary's action was contrary to the Act, which requires, *inter alia,* that safety and health standards be based on the "best available evidence" and the "latest available scientific data in the field." Proven analytical techniques could have been utilized to yield objective and reliable evidence about the ultimate worth of the standard, which the Secretary chose to ignore. We also show that even if a test less severe than the substantial evidence test is applied, the Secretary's action must be set aside, because it was irrational for the Secretary to promulgate a fabulously expensive standard without the slightest notion of the benefits to be derived.

We also demonstrate that as the record shows, the Secretary could have estimated the benefits of the benzene standard. We further suggest that important public policy objectives would be served by compelling such an analysis. The Foundation is concerned that this Court's condonation of the Secretary's approach to the instant standard would be interpreted by the Secretary

and other comparable federal risk regulators as a license to ignore considerations militating against regulatory actions they may propose. Such a decision would also diminish the incentive of those administrators to ensure that the best available analytical techniques are brought to bear upon the complex technological issues that confront them. The public's interest in the sound and reasonable administration of federal health and environmental legislation would be ill-served by such a result.

Owing allegiance to no interest other than that of the general public, the Capital Legal Foundation respectfully submits this brief as *Amicus Curiae.* All parties have consented to the filing of this brief. Copies of the letters of consent are filed with this brief.

STATEMENT OF THE CASE

The Capital Legal Foundation adopts the Statement of the Case contained in the brief of the Respondents.

SUMMARY OF ARGUMENT

I.

In certain cases, this Court has disregarded the language of a statute because poor draftsmanship or a legislative compromise produced ambiguities, or because the Court believed that a literal interpretation would compromise the statute's purposes. *E.g., United Steelworkers of America, AFL-CIO-CLC* v. *Weber,* 47 U.S.L.W. 4851, 4857 (June 27, 1979). In the instant case, the Court is presented with no such difficulty in construing the provisions of the Occupational Safety and Health Act of 1970 governing judicial review of safety and health standards. Section 6(f) of the

Act states plainly that judicial review of all of the Secretary's determinations in promulgating a standard is under the substantial evidence test. The legislative history confirms this conclusion, and reveals that the enactment of the substantial evidence test in Section 6(f) was the result of a legislative compromise which was important to the passage of the Act. See *Associated Industries of New York State, Inc.* v. *United States Dep't of Labor*, 487 F.2d 342, 348 (2d Cir. 1973). The purposes of the Act would not be adversely affected if the substantial evidence test is applied. Thus, there is no occasion for this Court to disregard the plain terms of the Act, and judicial review of the Secretary's benzene standard is therefore under the substantial evidence test.

II.

In promulgating the benzene standard, the Secretary decided not to prepare an estimate of the benefits to be derived from the standard. He concluded that it would be impossible to prepare such an estimate, assertedly because there is no known dose-response curve for benzene. The Secretary contends that his decision not to estimate the benefits of the standard is a "policy" judgment which the Act entitles him to make, and he argues at least implicitly that such "policy" judgments are subject to judicial review under the less exacting "arbitrary and capricious" test.

Regardless of the standard of judicial review that is applied, the Secretary's action was unlawful. As the Court below found, contrary to the Secretary's assertion, a rough but educated estimate of the benefits of the standard could have been performed, and preliminary estimates of a dose-response curve for benzene are ap-

parently already available. The Secretary's judgment that it would be impossible to prepare such an estimate is therefore unsupported by substantial evidence. Also, the Act, its legislative history, and the decisions of courts which have considered the issue all leave no doubt that the benefits of a standard are a factor which the Secretary must consider in detail. See, e.g., *RMI Co.* v. *Secretary of Labor and OSAHRC*, 594 F.2d 566 (6th Cir. 1979); *Turner Co.* v. *Secretary of Labor*, 561 F.2d 82 (7th Cir. 1977). Therefore, by refusing to perform the estimate, the Secretary violated the requirements of the Act which command, *inter alia*, that he regulate on the basis of the "best available evidence" and the "latest available scientific data in the field." Section 6(b)(5), 29 U.S.C. § 655(b)(5). Further, by ignoring the benefits of the standard, the Secretary did not consider a factor which was obviously relevant to the issues before him. His decision was consequently irrational, and therefore "arbitrary and capricious", in the traditional administrative law sense. *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971).

Finally, while refusing to perform an analysis of the benefits of the standard, the Secretary declared that the benefits "may be appreciable." As the Court below found, the Secretary's statement was based on the assumption that exposure to lower levels of carcinogens is safer than exposure to higher levels. The Court below properly concluded that while there may be "some" evidence to support this proposition, there is hardly the substantial evidence required by the Act. This is especially true since, as noted above, additional information about the benefits of the standard was readily available to the Secretary. Indeed, during

the underlying rulemaking proceedings, both the Council on Wage and Price Stability and the Department of Health, Education and Welfare informed OSHA that such an estimate could, and should, be performed.

In sum, under any applicable standard of review, the Secretary's failure to estimate the benefits of the standard was unlawful.

III.

Important policy objectives would be served if the Secretary is required to estimate the benefits of standards he promulgates. First, such a result would contribute to assuring a full inquiry by the Secretary into the issues that confront him, thus strengthening OSHA rulemaking procedures. Second, such a requirement would assure that the value judgments implicit in the Secretary's choices are made explicit, thus increasing public acceptance of and confidence in his determinations. On this subject, we believe that the Secretary's reluctance to admit that the choices he must make involve evaluation of monetary considerations and human value judgments reflects an immature approach to risk regulation. In regulations such as the instant one, reconciliation of these competing interests is inevitable. See Handler, *A Rebuttal, the Need For a Sufficient Scientific Base for Government Regulation,* 45 Geo. Wash. L. Rev. 808 (1975). Third, a requirement that the Secretary consider the benefits of a standard will help overcome the inevitable institutional bias which regulators often develop in favor of their own regulatory proposals. See *Sierra Club* v. *Froehlke,* 486 F.2d 946, 950 (5th Cir. 1973). Finally, to compel the Secretary to make such an analysis may have the salutary effect of causing him to improve the quality of his policy analysis staff, which the record reveals is poorly regarded by experts in the field. *See, e.g.,* Appendix at 140, 141 (testimony of Dr. Richard Zeckhauser).

Contrary to the implication inherent in the Government's brief, an analysis of the benefits of the standard would not necessarily have required precise incremental quantification of those benefits. Less precise estimates could have been performed, and would have been useful to the Secretary. This does not mean, however, that quantification of benefits should not be attempted where it is possible. Indeed, quantification would contribute to objectivity, and should be established as a regulatory goal.

Finally, it should be emphasized that the issue here is a narrow one. The question is not whether the Secretary's final choices gave too much consideration to costs or benefits in the standard under review. This record does not permit the Court to make that assessment, since the Secretary did not estimate the benefits in the first place. The only question here is whether the estimate of benefits was required to be performed.

IV.

To condone the Secretary's failure to estimate the benefits of the instant standard would be to sanction conduct violative of the Act and irrational under any sensible standard of review. Also, such a decision would surely be interpreted by the Secretary and by other comparable federal risk regulators as a license to bring less than the best available analytical techniques to bear upon the complex issues that confront them. This would weaken the administrative process

upon which the society heavily depends to resolve many such complex technological issues. Such an outcome would ill-serve the public interest. Accordingly, the judgment of the Court below should be affirmed.

ARGUMENT

I. The Act Commands Judicial Review of the Secretary's Determinations Under the Substantial Evidence Test

This Court "[o]ften [has] difficulty interpreting statutes either because of imprecise drafting or because legislative compromises have produced genuine ambiguities." [1] On other occasions, the Court has disregarded the literal language of a statute because the Court believed that a literal interpretation "would 'bring about an end completely at variance with the purpose of the statute.' " [2] In these latter cases, the Court has examined the legislative history and the historical background of the statute to discern the true purpose of the Congress, on the ground that " 'a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.' " [3]

With respect to the scope of judicial review of the Secretary's determinations in the instant case, the Court is presented with none of these dilemmas. The language of the statute is clear, and it accurately reflects a legislative compromise which was important to the passage of the Act.[4] Indeed, to give literal effect to the language of the Act would be finally to vindicate the stated intent of Congress. Moreover, such an interpretation would not adversely affect the purposes of the Act.

The Act is unusual in that "it does not depend upon reference to the Administrative Procedure Act for specification of the procedures to be followed" in the development of OSHA standards, or the scope of judicial review.[5] Rather, the scope of review is governed by Section 6(f) of the Act, 29 U.S.C. § 655(f), which provides:

> Any person who may be adversely affected by a standard issued under this section may at any time prior to the sixtieth day after such standard is promulgated file a petition challenging the validity of such standard with the United States Court of Appeals for the circuit wherein such person resides or has his principal place of business, for a judicial review of such standard. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The filing of such petition shall not, unless otherwise ordered by the court, operate as a stay of the standard. *The determinations of the Secretary shall be conclusive if supported by substantial evidence in the record considered as a whole* (emphasis added).

The plain language of Section 6(f) leaves no doubt that the "determinations" to which it applies the sub-

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[1] *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 47 U.S.L.W. 4851, 4857 (June 27, 1979) (Burger, C.J., dissenting).

[2] *Id.* at 4853, quoting *United States* v. *Public Utilities Comm'n*, 345 U.S. 295, 315 (1953).

[3] *Id.* at 4853, quoting *Holy Trinity Church* v. *United States*, 143 U.S. 457, 459 (1892).

[4] The Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (hereinafter cited as "the Act").

[5] *Industrial Union Dep't, AFL-CIO* v. *Hodgson*, 499 F.2d 467, 472 (D.C. Cir. 1974).)

stantial evidence test refers to all of the Secretary's decisions in promulgating a safety or health standard, "includ[ing] the overall *policy* decision to promulgate a rule." "The word 'determinations' is used throughout § 655 to include policy choices as well as factual findings, and particularly to include promulgation of standards." [6] Thus, the Act makes it clear that judicial review of the standard here in question must be under the substantial evidence test.

The legislative history of the Act confirms that the substantial evidence test is to be applied to the Secretary's determinations. The OSHA bill as enacted by the Senate provided for the informal rulemaking procedures which were contained in the bill as ultimately enacted. However, the Senate version was silent on the scope of judicial review. The House-passed bill would have required formal rulemaking procedures on the record in accordance with 5 U.S.C. §§ 556 and 557. In conference, the Senate version was adopted with respect to judicial review. The "tradeoff" made by the conferees was that the House would recede from its insistence upon formal rulemaking on the record dur-

[6] *Associated Industries of New York State, Inc.* v. *United States Dep't. of Labor*, 487 F.2d 342, 348 (2d Cir. 1973) (emphasis added).

See, e.g., Section 6(b)(1), 29 U.S.C. § 655(b)(1) ("Whenever the Secretary . . . *determines* that a rule should be promulgated . . .") (emphasis added); Section 6(b)(2), 29 U.S.C. § 655(b)(2) ("Where an advisory committee is appointed and the Secretary *determines* that a rule should be issued, he shall publish the proposed rule . . .") (emphasis added); Section 6(b)(4), 29 U.S.C. § 655(b)(4) (the Secretary shall either issue a rule "or make a *determination*" that one will not be issued) (emphasis added); Section 6(g), 29 U.S.C. §655(g) ("In *determining* the priority for establishing standards under this section, the Secretary shall give due regard" to the enumerated factors) (emphasis added).

ing the hearing stage in return for the Senate's agreement to the substantial evidence test upon judicial review of the promulgated rule.[7]

That this is precisely what Congress intended is confirmed by the statements of Representative Steiger, one of the Act's sponsors, during the floor debate in the House on the conference report. Thus, in urging his House colleagues to accept the compromise, Representative Steiger noted that the conference bill contained several items which the House had originally insisted upon, including "the test for judicial review of standards." [8] Later in the debate, Representative Steiger underscored his understanding that the substantial evidence test would be applied:

> The Secretary's standard will *only* be sustained by the courts if it is supported by substantial evidence of the record considered as a whole. Thus, the Secretary must have a record upon which to base his findings and serve as the basis for judicial review * * * * [T]he Court review based upon substantial evidence provides a sufficient element of fairness to satisfy me that the conference report should be adopted.[9]

Given the unequivocal language of the statute which accurately reflects an important legislative compromise, it is clear that the standard of judicial review of all of the Secretary's determinations in promulgating

[7] See Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., Legislative History of the Occupational Safety and Health Act of 1970, 1201, 147, 1187 (Comm. Print 1971) (hereinafter cited at "Leg. Hist.").

[8] Leg. Hist. 1212.

[9] Leg. Hist. 1218 (Emphasis added).

standards, including so-called "policy" determinations, is the substantial evidence test.[10]

II. The Secretary's Failure To Estimate the Benefits of the Benzene Standard Is Unlawful Also. His Finding That Benefits "May Be Appreciable" Is Not Supported by Substantial Evidence

A. The findings of the Court below

The Fifth Circuit found that the Secretary did not even "attempt . . . to measure the extent to which the

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[10] *Associated Industries of New York State Inc.* v. *United States Dep't of Labor, supra; Florida Peach Growers Ass'n* v. *United States Dep't of Labor,* 489 F.2d 120, 128, n.13, (5th Cir. 1974). But see *Industrial Union Dep't, AFL-CIO* v. *Hodgson, supra.* In *IUD,* which is the seminal case on this point, the D.C. Circuit held that certain of the Secretary's determinations may be "on the frontier of scientific knowledge," and therefore not susceptible of factual support. The Court therefore concluded that as to such policy judgments, "the court's approach must necessarily be different no matter how the standards of review are labeled [by Congress]." 499 F.2d at 475. Accord: *Society of the Plastics Industry, Inc.* v. *OSHA,* 509 F.2d 1301 (2d Cir. 1975); *American Iron & Steel Institute* v. *OSHA,* 577 F.2d 825 (3d Cir. 1978).

We submit that reviewing courts are not free to disregard the clear statutory language and legislative intent, and substitute their own notions of proper judicial review. The Secretary will not be prevented from accomplishing his statutory purposes if the substantial evidence test is applied, for it will be the rare case indeed in which there will be literally no evidence bearing upon a "policy" matter before him. This case provides a perfect example; as we discuss more fully *infra,* the Secretary claimed that it was impossible to estimate the benefits of the benzene standard, because there assertedly is no known dose-response curve for benzene. However, the Court below found that preliminary estimates of a dose-response curve are already being made. In any event, Section 6(b)(5) of the Act embodies Congress' recognition that perfect and complete evidence will not always be available, and it accordingly permits the Secretary to regulate on the flexible bases of the "the best available evidence," "research, demonstrations and experiments," and "the latest available scientific data in the field." 29 U.S.C. § 655(b)(5).

leukemia hazard of benzene exposure would be reduced by lowering the permissible exposure limit from 10 ppm to 1 ppm."[11] Rather, the Secretary merely assumed that the benefits from such a reduction "may be appreciable." He "based this assumption on a finding that benzene was unsafe at any level, and that exposures to lower levels of toxic materials would be safer than exposures to higher levels."[12] The Court concluded that this "assumption" did not satisfy the requirements of the Act.

The Secretary contended that "risk quantification at low exposure levels and therefore estimates or expected benefits from the standard cannot presently be made . . ."[13] The Court held that while an elaborate, cost-benefit analysis of the standard could not be made,[14] the Secretary could, and should, have made a "rough but educated estimate . . . of the extent of benefits expected from reducing the permissible exposure level from 10 ppm to 1 ppm."[15]

The Secretary contends that his decision not to estimate the benefits of the benzene standard was a policy choice which he was licensed to make under the Act. The implication is that this decision is subject to review under the "arbitrary and capricious" test which courts like the D.C. Circuit in *Industrial Union*

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[11] *American Petroleum Institute, et al.* v. *OSHA,* 581 F.2d 493, 503 (5th Cir. 1978).

[12] *Id.*

[13] *Id.* at 504 n.23.

[14] *Id.*

[15] *Id.* at 504.

Dep't, AFL-CIO v. *Hodgson* would apply to policy judgments.

In determining whether administrative action has been arbitrary or capricious, a court must determine, *inter alia*, whether "the decision was based on a consideration of the relevant factors . . ."[16] Where, as here, the administrative action (or omission) relates directly to a major judgment involving competition among conflicting interests, the Court must examine it with care.[17]

In the remainder of Section II of this brief, we demonstrate that detailed consideration of the benefits of the standard is mandated by the plain terms of the Act, and by the crucial portions of its legislative history. We also show that the record supports the conclusion that the Secretary could, in fact, have produced at least a "rough but educated estimate" of the benefits of the standard, and that his failure to do so was therefore unsupported by substantial evidence. Even if the "arbitrary and capricious" test is applied, the Secretary fails, because his "policy" decision not to estimate benefits ignored a factor which he was mandated to consider under the Act. Finally, we demonstrate that the Secretary's declaration that benefits "may be appreciable" was, as the Court below found,

[16] *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971); *Bowman Transp., Inc.* v. *Arkansas Best Freight Systems*, 419 U.S. 281, 285 (1974).

[17] *American Shipbuilding Co.* v. *N.L.R.B.*, 380 U.S. 300, 318 (1965); *N.L.R.B.* v. *Brown*, 380 U.S. 278 (1965); *Matson Navigation* v. *Connor*, 258 F. Supp. 144 (N.D. Cal. 1966), aff'd 394 F.2d 514 (9th Cir. 1968), cert. denied 393 U.S. 998.

based on an assumption, and not supported by substantial evidence on the record considered as a whole.[18]

B. The language of the Act

The provisions of the Act governing the promulgation of safety and health standards leave no doubt that the Secretary cannot ignore the question of the benefits those standards will generate in terms of increased employee protection. It is a matter plainly relevant to his determinations, for the statute does not authorize the Secretary to seek absolute protection of employee safety and health. Rather, the Act speaks in relative terms throughout, and commands the Secretary to consider a variety of factors in promulgating standards.

Thus, Section 2(b) states that the purpose of the Act is "to assure *so far as possible* every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. § 651(b) (emphasis added). Obviously, if the Secretary is to assure that the nation's finite resources for promoting occupational safety and health are allocated so as to offer protection from as many hazards as possible,[19] and not just the one which happens

[18] We wish to emphasize that the issue presented in this case is a narrow one. The question is now how the relative costs and benefits of a standard should be reconciled under the Act. That question cannot be answered on this record since the Secretary has provided no estimate of benefits in the first place. The only question here is whether the Secretary should have made such an estimate. A decision on the proper influence of costs and benefits upon the Secretary's final choices under the Act must await a case in which the requisite factual predicates are present.

[19] The Occupational Safety and Health Review Commission ("OSHRC") has recognized that "employers have finite resources

to occupy the Secretary's attention at the moment, common sense tells us that the Secretary must consider what, if any, benefit will be derived from the expenditure of enormous sums to combat just one of those hazards.

Next, Section 3(8) of the Act states that the standards promulgated by the Secretary can only establish "conditions . . . practices, means, methods, operations, or processes, *reasonably necessary* or appropriate to provide safe or healthful employment and places of employment." 29 U.S.C. § 652(b) (emphasis added). Again we see that Congress mandated consideration of the reasonableness of standards which the Secretary would adopt.

Section 6(b)(5) of the Act, 29 U.S.C. § 655(b)(5), provides:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, *on the basis of the best available evidence,* that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, *other considerations*

available for use to abate health hazards." *Continental Can Co.*, 4 BNA OSHC 1541, 1547, 1976-77 CCH OSHD ¶ 21,009 at 24,256 (1976).

> *shall be the latest available scientific data in the field,* the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of *objective criteria* and of the performance desired (emphasis added).

Here we see that contrary to the position of the Secretary, the question whether an employee "will suffer material impairment of health or functional capacity" is not the only relevant concern in promulgating standards governing exposure to toxic materials or harmful physical agents. The Secretary must consider "the best available evidence," and he "*shall* [consider] the latest available scientific data in the field . . ." (emphasis added). Also, "[w]henever practicable," standards must be expressed "in terms of objective criteria." The obvious implication of this Congressional command is that the process of setting standards must be as objective as practicable. Subjective determinations are unlikely to result in standards which permit evaluation of an employer's performance in objective terms.

In sum, the language of the statute makes it clear that Congress required objective consideration of that which is "possible" and "reasonable." The terms of the Act also leave no doubt that the Secretary simply is not free to disregard the "best available evidence" and the "latest available scientific data in the field". By ignoring available analytical techniques which would have yielded such evidence and data, the Secretary acted irrationally, and he violated these clear statutory requirements.

C. The key legislative history

That the Act was intended by Congress to insure that the Secretary would consider the measure of benefits to be derived from a standard is also clear from the critical portions of the legislative history. The provision of the Act relied upon most heavily by the Secretary, i.e., the requirement that standards be "feasible," was the product of an amendment authored by Senator Javits. The bill he sponsored (S. 2788) defined feasibility for the purpose of standards as including the "technical feasibility, reasonableness, and practicality" of the standard.[20] Senator Javits' bill was not accepted, but the term "feasibility" was included in the bill reported out by the Senate Committee. Senator Javits explained the purpose of his amendment as follows:

> As a result of this amendment the Secretary, in setting standards, is expressly required to consider feasibility of proposed standards. This is an improvement over the Daniels bill, which might be interpreted to require absolute health and safety in all cases, regardless of feasibility, and the Administration bill, which contains no criteria for standards at all. Leg. Hist. 58.[21]

[20] S.2788 § 4(c); Leg. Hist. 38-39.

[21] Interestingly, in commenting on the Senate Committee's bill, Senator Javits stated that based on the history of the Department of Labor's enforcement of safety and health standards, "labor has little reason to expect, or business any reason to fear, overly energetic administration of this Act by the Secretary of Labor or disregard by him of the legitimate concerns of business." Leg. Hist. 55. Even given these expectations, the Senator insisted on an amendment which made it plain that the Secretary is not to seek absolute health protection. Had Senator Javits anticipated that the Secretary would disregard considerations which might militate against regulatory action which he proposed, as the Secretary has done here, perhaps the Senator would have sought even more explicit restraints on the Secretary's power. In any event, it is clear that the disregard for opposing views which the Secretary has exhibited in this case is not what the Senator desired, or expected.

Later, when the Senate Committee bill was being considered by the full Senate, Senator Dominick was concerned that the effect of Senator Javits' amendment had been diluted. Senator Dominick was concerned that the first sentence of Section 6(b)(5) as reported [22]

> could be read to require the Secretary to ban all occupations in which there remain some risk of injury, impaired health or life expectancy. In the case of all occupations, it will be impossible to eliminate all risks to safety and health. Thus, the present criteria could, if literally applied, close every business in this nation. In addition, in many cases, *the standard which most 'adequately' and 'feasibly' assures the elimination of the danger would be the prohibition of the occupation itself.* Leg. Hist. 367 (emphasis supplied in part, added in part).

Ultimately, Senator Dominick introduced an amendment to the first sentence of Section 6(b)(5) which was adopted without objection, and which was included in the bill as enacted. The amendment injected the phrase "dealing with toxic or harmful physical agents," thus clarifying that the first sentence of Section 6(b)(5) applies only to occupational safety and health standards. The amendment also injected the phrase "to the extent feasible," thus establishing feasibility

[22] Section 6(b)(5) of S.2193 as reported provided:

> The Secretary in promulgating standards under this subsection, shall set the standard which most *adequately and feasibly assures,* on the basis of the best available evidence, that no employee will suffer *any* impairment of health or functional capacity, or diminished life expectance even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Leg. Hist. 242 (emphasis added).

as an express limitation on the Secretary's obligation to "adequately" assure that employees would not be materially impaired. Finally, the word "material" was substituted for the word "any" in describing the level of impairment which the Secretary should strive to prevent. That this change was intended to limit the Secretary's prerogatives is clear. Senator Dominick explained his amendment as follows:

> What we were trying to do in the bill—unfortunately, we did not have the proper wording or the proper drafting—was to say that when we are dealing with toxic or physical agents, we ought to take such steps as are feasible and practical to provide an atmosphere within which a person's health or safety would not be affected. Leg. Hist. 502.

The plain import of the Javits and Dominick amendments is that the Secretary's efforts to protect employees must be tempered with an element of practicality and reasonableness. Given the concerns which Senators Javits and Dominick expressed, it is inconceivable that the amendments they offered contemplated that the Secretary would literally refuse to determine whether a major health standard would yield benefits. Obviously, Congress intended that the benefits of a standard would be of important concern to the Secretary. His decision to treat the matter as irrelevant here, evidenced by his refusal even to estimate benefits, was therefore irrational as a matter of law because he did consider all relevant factors. It also contravened the requirements of the Act, which as shown, command an evaluation of the reasonableness of a standard, and specifically direct the Secretary to consider the "best available evidence" and the "latest available scientific data in the field."

D. Decisions addressing the benefit issue: the noise cases

That the benefit to be derived from a standard is not only a relevant, but also a mandatory, consideration under the Act is confirmed by decisions of OSHRC and the courts construing OSHA's standard governing exposure to noise. In *Continental Can, supra,* OSHRC analyzed the Congressional intent relating to the economic "feasibility" of OSHA standards, and concluded:

> * * * the standard should be interpreted to require those engineering and administrative controls which are economically, as well as technically feasible even though they are expensive and increase production costs. See *Arkansas Best Freight Systems, Inc.* [v. *OSHRC,*] 529 F.2d 649, 653 (8th Cir. Jan. 29, 1976); *Industrial Union Department, AFL-CIO* v. *Hodgson, supra,* 449 F.2d at 477 [(D.C. Cir. 1973)]. But they will not be required without regard to the costs which must be incurred and the benefits they will achieve. In determining whether controls are economically feasible, *all the relevant cost and benefit factors must be weighed.*[23]

OSHRC has subsequently reaffirmed and applied this standard several times.[24]

Both the Sixth and Seventh Circuits have embraced OSHRC's view. Thus, in *Turner Co.* v. *Secretary of*

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[23] 4 BNA OSHC at 1547 (emphasis added).

[24] *Atlantic Steel Co.,* 6 BNA OSHC 1289, 1977-78 CCH OSHD ¶ 22,843 (1978); *Castle & Cook Foods,* 5 BNA OSHC 1345, 1977-78 CCH OSHD ¶ 21,854 (1977), petition for review pending (9th Cir. No. 77-2565-66); *Great Falls Tribune Co.,* 5 BNA OSHC 1443, 1977-78 CCH OSHD ¶ 21,844 (1977).

Labor,[25] OSHRC had taken a position contrary to the one it expressed in *Continental Can,* and had ordered the employer to install engineering controls designed to reduce noise levels at a cost of approximately $30,000. The employer had an effective program of personal protective equipment, and demonstrated that no employee had suffered hearing loss. The Seventh Circuit determined to adopt the analysis of the legislative history of the Act contained in OSHRC's *Continental Can* decision, and held that the Review Commission must "realistically consider the hazards presented by the excessive noise . . . and determine whether the health benefits . . . justify the $30,000 cost to Turner for engineering controls." [26]

The Sixth Circuit has set forth in detail its view of the role that consideration of benefits and relative costs plays in the application of OSHA standards. Thus, in *RMI Co.* v. *Secretary of Labor and OSAHRC,*[27] the Court stated:

> We approve the above-stated cost-benefit analysis employed by the OSHRC [in *Continental Can*].
>
> It must be emphasized that the primary purpose of the statute and regulations is 'to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve human resources.' 29 U.S.C. § 651(b). Thus the benefits to employees should weigh heavier on the scale than the costs to employers. Controls will not necessarily be economically infeasible merely because they are expensive.

[25] 561 F.2d 82 (7th Cir. 1977).

[26] 561 F.2d at 85-86.

[27] 594 F.2d 566 (6th Cir. 1979).

> But neither will controls necessarily be economically feasible merely because the employer can easily (or otherwise) afford them. In order to justify the expenditure, there must be a reasonable assurance that there will be an appreciable and corresponding improvement in working conditions. The determinations of how the cost-benefit balance tips in any given case must necessarily be made on an *ad hoc* basis. We do not today prescribe any rigid formula for conducting such analysis. We only insist that the Secretary, and the OSHRC on review weigh the costs of compliance against the benefits expected to be achieved thereby in order to determine whether the proposed remedy is economically feasible.[28]

Turner, RMI and the OSHRC decisions [29] make it clear that the benefits of a standard are an important factor which the Secretary must consider.[30]

[28] 594 F.2d at 572-73.

[29] See discussion and cases cited *supra,* p. 21.

[30] In *Turner,* the Sixth Circuit noted its agreement with the Review Commission's comment in *Castle & Cook, supra,* that other hazards may be more serious or "life threatening" than noise. 561 F.2d at 86. It appears that the Court offered this comment at least in part to justify its conclusion that the costs and benefits of engineering controls to abate noise should be balanced. However, the Court's comment cannot be construed to mean that similar considerations do not apply to standards governing more dangerous hazards. First, Section 6(b)(5) of the Act makes no such distinction; the factors which it commands the Secretary to consider apply to all standards governing "toxic materials or harmful physical agents." Indeed, this was exactly one of the points of the Dominick amendment to Section 6(b)(5). See discussion *supra,* p. 19. Second, it is precisely because all substances and physical hazards do not pose the same degree of risk that an estimation of the benefits to be derived from standards must be made. Otherwise, there would

E. The evidence that an analysis of benefits could have been performed.

The Secretary defends his action chiefly on the ground that any analysis of benefits would have required precise quantification of those benefits, and that such quantification is impossible because there is no known dose-response curve for benzene. However, as noted earlier, a broad range of analytical techniques could have been applied to develop at least a "rough but educated" estimate of the benefits of the standard which would have been useful to the Secretary.

It must be noted at the outset that there is no single form of cost-benefit analysis, cost-effectiveness analysis, risk assessment or of synonomous or similar techniques.[31] The available approaches "range from the narrow and technical to the broad, vague, almost metaphysical." [32] Thus, we do not, and could not, urge that

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be no rational way to allocate the finite resources available to deal with these various risks.

See also *Florida Peach Growers Ass'n* v. *Dep't of Labor, supra,* 489 F.2d at 130. ("The promulgation of any standard will depend upon a balance between the protection afforded by the requirement and the effect upon economic and market conditions in the industry."); *United Parcel Service of Ohio, Inc.* v. *OSHRC,* 570 F.2d 806, 810-13 (6th Cir. 1978) ("the rule to be applied is one of reasonableness and feasibility.").

[31] Kasper, *Cost-Benefit Analysis in Environmental Decisionmaking,* 45 Geo. Wash. L. Rev. 1013 (1977).

[32] *Id.* Accord: Green, *Cost-Risk-Benefit Assessment and the Law: Introduction and Perspective,* 45 Geo. Wash. L. Rev. 901, 902 (1977); R. Smith, *The Occupational Safety and Health Act, Its Goals and Achievements* 42 (American Enterprise Institute, 1976).

a particular analytical procedure be imposed upon the Secretary.[33] To the contrary, a number of analytical techniques could have been applied to yield an estimate of benefits. Moreover, a "rough but educated estimate"

At attempt has been made to reduce the "diffuse and difficult" literature on this subject into a form "lawyers could comprehend and use." Albert, *Some Epistemological Aspects of Cost-Benefit Analysis,* 45 Geo. Wash. L. Rev. 1025, 1026 (1977). Having bravely undertaken this effort, Professor Albert concluded with relevance to the instant case:

> [W]e face an urgent need for precise rules to measure the adequacy of information on which administrative cost-benefit decisions are to be made. This quest, though perhaps uncongenial to the legal mind, is the key to answering the fundamental question: What decision do sane people make while waiting for the facts to be determined? *Id.* at 1035-36 (footnotes omitted).

[33] It is not our view that the "statutory minima" require use of a particular procedure. Compare, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.,* 435 U.S. 519, 548 (1978). Rather, we urge only that the statute requires consideration of the benefits to be derived from the standard.

In a recent article, Judge Bazelon has wondered whether *Vermont Yankee* "will herald a new era of good feelings or instead exacerbate the tension created by judicial review . . ." Bazelon, *Risk Regulation and Responsibility,* 65 Am. Bar Ass'n J. 1066, 1069 (1979). Judge Bazelon indicated his general endorsement of Professor William Rodgers' analysis of *Vermont Yankee. Id.* With substantial relevance here, Professor Rodgers has suggested that *Vermont Yankee* should not be read as "discouraging remands to correct record weaknesses that are best improved by resort to specific procedural techniques," or "to take the impetus out of the agencies' innovative use of procedures beyond the statutory minima." Also, agencies should not be permitted to invoke the decision to defend "crabbed rationalizations of adopted rules." Rodgers, *A Hard Look at Vermont Yankee: Environmental Law Under Close Scrutiny,* 67 Geo. L. J. 699, 714-15 (1979).

of benefits is exactly what the Court below requested;[34] indeed, the Court expressly disclaimed any intention of requiring an elaborate cost-benefit analysis.

The Secretary's view that even such a "rough" analysis could not be performed is contradicted by the record evidence of the recommendations of the Council on Wage and Price Stability ("COWPS") and the Department of Health, Education and Welfare ("HEW") concerning the proposed standard. COWPS concluded that the proposal did "not reflect sufficient considerations of the costs and attendant health benefits of the standard," and that such an analysis was "critical."[35] COWPS outlined in detail the analytical procedures it believed the Secretary should employ. COWPS also recognized, as we have emphasized here, that while the analyses it suggested might not yield "an accurate calculation of incremental benefits, they would provide a range of health benefit estimates that should be included in an economic analysis in order to aid OSHA in setting the final standard."[36] HEW's comment was somewhat more direct, admonishing OSHA that "real world pragmatism requires a systematic decisionmaking process" that takes cognizance of the varying degrees of potencies among carcinogens.[37]

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[34] 581 F.2d at 504.

[35] Appendix at 121, 131.

[36] Appendix at 130.

[37] Letter of Charles Custard, Director of HEW Office of Environmental Affairs, dated July 12, 1977 (Ex. 205.A).

The significant point about the COWPS and HEW recommendations is not that two government agencies disagree with the Secretary on an issue which transcends OSHA and touches all risk-

A "rough but educated" estimate of benefits—not precise incremental analysis—is what others besides COWPS and HEW recommended during the proceedings before the Secretary. For example, Dr. Richard Zeckhauser of the Kennedy School of Government at Harvard University testified:

> While I appreciate the fact that the limited data available make it impossible, as the [Arthur D. Little] study suggests . . . to specify 'benzene's precise dose-response relationship,' it is also impossible to evaluate the standard in any meaningful way without some estimate, *however crude,* of its benefits. Even if such an estimate could not be refined beyond a broad range of possible effects, it would be of immense value. From the documents I have seen, we have no idea whether the proposed standard would save no lives, ten lives, or 1000 lives for an annual expenditure of more than $100 million. At the very least OSHA should present a range of estimates of the health losses due to current levels of exposure to benzene. With such estimates it would be possible to place an upper bound on the incremental gains of the proposed standard, as OSHA admits that it will not eliminate all health effects.[38]

Besides aiding the Secretary in determining the appropriate exposure level, an analysis of benefits, "however crude", would have helped him evaluate other portions of the standard as well. For example, the

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regulating agencies, although that fact is surely a disturbing one. The point is that record support for the Secretary's decision not to perform an analysis of the benefits of the standard is substantially weakened by the evidence of the views of COWPS and HEW.

[38] Appendix at 144 (emphasis added).

analysis could have helped determine how many medical examinations of workers exposed to benzene are needed annually, or what changes in information gathering might occur if the expenditures for monitoring programs are reduced or raised by a certain percentage from the expenditure amount contemplated in the proposed standard.[39]

As the Court below noted, the Secretary did not instruct Arthur D. Little Company, his consultant on the feasibility of the standard, to examine the benefits of the standard. The consultant testified, however, that some analysis of risk quantification could have been performed had it been requested. The Court also noted that the Environmental Protection Agency had recently released a Preliminary Report on Population Risk to Ambient Benzene Exposures, which attempted to determine the risk of leukemia to the general population at the exposure level of 1 ppm.[40]

In sum, the record contains ample proof that at least a "preliminary assessment" of the risks associated with benzene are being made, and that analytical techniques which would have enlightened the Secretary on this issue could have been utilized, but were not.

F. Summary

We have shown that the plain language of the Act, its legislative history, and the authorities which have construed them in connection with the instant question combine to leave no doubt that the Secretary was obligated to consider the benefits of the standard under

[39] *Id.* at 141.

[40] 581 F.2d at 504 n.23.

review. We have also shown that the record supports the conclusion that a useful estimate could have been performed, and that his decision not to perform the estimate is unsupported by substantial evidence. It is likewise clear that the Secretary failed to consider all of the factors relevant to this decision, and thus acted arbitrarily and capriciously in the traditional administrative law sense. He also ignored the requirements of the Act, most pertinently Section 6(b)(5), which commands that he regulate on the basis of the "best available evidence" and "the latest available scientific data in the field." Finally, inasmuch as his declaration that the benefits of the standard may be "appreciable" is bottomed on nothing more than an "assumption," his factual finding on this key point is unsupported by substantial evidence. Accordingly, the standard is invalid, and the judgment of the Court below should be affirmed.

III. Important Public Policy Objectives Would Be Served by Requiring an Analysis of the Benefits of OSHA Standards

In his recent discussion of risk regulation, Judge Bazelon has commented that "there is no one answer" to the question of "how much risk is acceptable." Judge Bazelon thus concludes that "we must have confidence in the decision-making process so that we may better tolerate the uncertainties of our decisions."[41] As we have emphasized here, more specific procedural safeguards are not the answer.

> It is not the procedures but the fullness of the inquiry that is paramount. If the inquiry is comprehensive and conscientious without additional procedural safeguards, it provides the best record we

[41] Bazelon, *supra* note 33, at 1066-67.

can hope for in making the difficult choices we now face.[42]

Here, the Secretary's inquiry was hardly a full one. By refusing to analyze benefits, he not only gave short shrift to an important statutory consideration, but he also went far to undermine the public's confidence in his decision. This Court's condonation of his actions could only be interpreted by the Secretary and by other comparable federal administrators as a license to conduct less than the fullest exploration of the complex matters that confront them. As Judge Bazelon has suggested, judicial insistence upon full and complete administrative inquiry can only strengthen the administrative process upon which our society must rely in dealing with complex, technological issues of risk regulation. Thus, to approve the Secretary's decision here would be to countenance laxity in administrative analysis, a result which would ill-serve the public interest.

Perhaps the most important role the courts can perform in reviewing administrative actions such as the instant one is to assure that the value judgments implicit in such decisions are openly stated and acknowledged by the decision-maker. "If the decision-making process is open and candid, it will inspire more confidence in those who are affected." [43] As one commentator has stated:

> If governmental decisions are made openly those who remain subject to inequitable risks [or costs] are more likely to understand and accept the predominance of societal interest over their own. If such a process produces regulatory decisions ac-

[42] *Id.* at 1069.

[43] *Id.*

> ceptable to a substantial majority of our society, it will fulfill successfully the expectations of democracy.[44]

On the subject of value judgments, the Secretary and his supporters emotionally argue that any consideration of costs and benefits would necessarily involve the assertedly immoral act of "placing an economic value (implicit or explicit) on life, health, bereavement, pain and suffering, and other consequences of occupational disease and death." [45] The Foundation believes that this view reflects a distinctly immature approach to regulation. Administrators charged with implementing risk-regulation statutes are inevitably involved in placing monetary values on the human condition. Dr. Philip Handler, President of the National Academy of Sciences, has articulated this point particularly well:

> In the field of public health, implementation of regulations results in the expenditure of n dollars to spare m lives or prevent x cases of diarrhea or y cases of benign skin tumors or z cases of mercury-induced nephritis. And decision-making implicity, if not explicitly, entails picking out the value, for example, of saving a random life or of preventing a bout of diarrhea or skin tumor.

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[44] Rowe, *Governmental Regulations of Societal Risks,* 45 Geo. Wash. L. Rev. 944, 958 (1977).

[45] Brief for the Federal Parties at 62 n.52. Of course, much of modern tort litigation is devoted to evaluating such consequences of injury, and statutory workman's compensation schedules reflect legislative evaluations of occupational injuries. Thus, the exercise which the Secretary eschews here is routinely performed by legislatures, administrative agencies, juries and courts.

> Since achieving zero risk is essentially impossible, decision will turn on the value, in dollars, which is placed on the marginal life. If those who engage in making such judgments—whether the costs are to be borne by the public purse or to be paid for by the consumer purchasing a product—do not understand that is what they are doing, *they are inadequately equipped for the task.*[46]

Contrary to the implication of the Secretary's brief, such considerations are hardly immoral. Indeed, to disclaim the obligation to place an economic value on the benefits of a risk regulation is intellectually dishonest:

> Even if it is considered morally objectionable to quantify the benefits of a safety or health program in explicit terms, one cannot escape the fact that any decision about such a program implies a set of benefits. It is more honest and useful to quantify these benefits explicitly than it is to pretend that one is 'above' such a 'dollars-and-cents' approach and then value the benefits implicitly.[47]

In sum, in response to the argument that regulators should not place an economic value on benefits, Dr. Handler states:

> Nonsense. Value judgments are dollar considerations.[48]

Even assuming that the Secretary is reticent about expressing his value judgments in monetary terms, that is no excuse for not estimating the benefits of an OSHA

[46] Handler, *A Rebuttal: The Need for a Sufficient Scientific Base for Government Regulation*, 43 Geo. Wash. L. Rev. 808, 810, 811 (1975) (emphasis added).

[47] Smith, *supra* note 28 at 36-37.

[48] Handler, *supra* note 46 at 810.

standard. As the Fifth Circuit has stated with respect to the examination of alternative actions required under the National Environmental Policy Act of 1969 ("NEPA"):[49]

> Specific assignment of dollar values to environmental factors, which are frequently not amenable to quantification may not be necessary, if the impact statement otherwise recognizes, and discusses, and weighs the favorable and adverse effects of agency action.[50]

Another important reason why an analysis of the benefits of the standard should be required is to counterbalance the inevitable bias which the Secretary will feel in favor of his own proposals. Both courts and commentators have observed this phenomenon, noting that administrators "with a commendable zeal to accomplish their appointed goals, develop a mission orientation that prevents them from giving full cognizance" to opposing views.[51] It is precisely because Congress recognized that federal administrators can easily become infected by such biases that agencies subject to NEPA are required to prepare environmental impact statements under Section 102 of that statute. The statements must contain analyses of the advantages and disadvantages of proposed actions:

> NEPA assumes as inevitable an institutional bias within an agency proposing a project and erects the procedural requirements of § 102 to insure that there is no way [the administrator] can fail to note the facts and understand the very serious ar-

[49] 42 U.S.C. § 4321 et seq.

[50] *Robinson* v. *Knebel*, 550 F.2d 422, 426 (5th Cir. 1977).

[51] Note, *Cost-Benefit Analysis in the Courts: Judicial Review under NEPA*, 9 Ga. L. Rev. 417, 447, 428, n.81 (1977).

guments advanced by the [opponents of his action] if he carefully reviews the environmental impact statements.[52]

As stated earlier, we do not here advocate that a new procedure be engrafted upon the Secretary's rulemaking procedures that would rise to the level of formality of an environmental impact statement (although we note that the Third Circuit has held that OSHA is subject to Section 102 of NEPA.)[53] Our point is that the rationale for requiring such analyses under NEPA is equally applicable here, for the Secretary is no less susceptible to an institutional bias in favor of his proposals than any other federal administrator.

Finally, another purpose for preparing environmental impact statements under NEPA is applicable here. One purpose of NEPA is to "force agencies to *acquire* expertise" in evaluating the risks of proposed environmental regulations.[54] The record indicates that OSHA is notably lacking in such expertise. As Dr. Zeckhauser of Harvard testified, "OSHA has made little effort in the policy analysis area," and "should establish as a top priority the development of a policy

[52] *Environmental Defense Fund* v. *Corps of Engineers, U.S. Army*, 470 F.2d 289, 295 (8th Cir. 1972), cert. denied, 412 U.S. 931 (1973), quoted in *Sierra Club* v. *Froehlke*, 486 F.2d 946, 950 (5th Cir. 1973). Accord: *Silva* v. *Lynn*, 482 F.2d 1282 (1st Cir. 1973).

[53] *Dry Color Manufacturers Ass'n* v. *Dep't of Labor*, 486 F.2d 98 (3d Cir. 1973)). The Secretary has promulgated regulations implementing NEPA in his administration of the Act. 29 C.F.R. Part 1999 (1978).

[54] *Aberdeen and Rockfish Railroad Co.* v. *S.C.R.A.P.*, 422 U.S. 289, 331 (1975) (Douglas, J., dissenting) (Emphasis in original).

analysis capability . . ." [55] Dr. Zeckhauser noted that even if Arthur D. Little Company had performed an assessment of risks, the Secretary could have made little use of it or of other similar analytical tools "absent a strong policy analysis staff." [56] Thus, a decision compelling full analysis of risk issues in promulgating safety and health standards could have the salutary effect of improving the quality of the Secretary's analytical capabilities.[57]

IV. Costs and Benefits Should Be Quantified to the Extent Reasonably Possible in Promulgating OSHA Standards.

We noted earlier that while a precise, incremental analysis of the benefits of the instant standard may not have been possible, broad, preliminary estimates of such benefits were available to the Secretary. However, with respect to future OSHA standards, the precise information lacking here may be attainable. Accordingly, we would urge the Court not to hold that quantification of costs and benefits is necessarily inappropriate in the development of OSHA standards. We submit that where these factors are reasonably susceptible of being quantified in economic terms, that should be done. Where a particular factor is not reasonably susceptible of being quantified in economic terms

[55] Appendix at 140, 141.

[56] *Id.* at 145.

[57] Ordinarily, courts will defer to the expertise of an agency's technical staff on matters of scientific experience and knowledge. *United States ex. rel. Chapman* v. *FPC*, 191 F.2d 796, 808 (D.C. Cir. 1951), aff'd 345 U.S. 153 (1953), quoted approvingly in *FPC* v. *Florida Power & Light Co.*, 404 U.S. 453, 466 (1972). However, where, as here, the agency's technical staff does not possess that expertise, deference would be inappropriate.

but is reasonably susceptible of being quantified in terms other than economic, that should be done. Finally, where a factor is not susceptible of quantification in any terms, economic or otherwise, the Secretary should at least identify that factor in the statement of reasons supporting his decision in a manner sufficient to permit him to consider it with the other factors which are susceptible of quantification.

A Committee of the National Academy of Sciences has studied the use of risk assessment techniques in government decision-making and found that contrary to some expectations, the analyses were not used to rationalize pre-determined political decisions. Rather, the committee found that:

> explicit, quantitative analyses has not induced mere lip service, as some skeptics originally suggested. Rather, it has lead to increasingly careful and thoughtful evaluations that have improved appraisals of programs as well as the quality of project designs.[58]

As the National Academy of Sciences report suggests, there is substantial concern in the nation's scientific community that where, as is the case with major OSHA health and safety standards, there is going to be "a significant dislocation of society or the expenditure of large sums, such actions cannot rest on unquantifiable values alone."[59] As Dr. Handler has said, when the government proposes regulations to reduce the risk associated with technology, "an *attempt* is required to

[58] Committee on Environmental Decision Making, National Academy of Sciences, Decision Making in the Environmental Protection Agency 36 (1977) (hereinafter cited as "Committee, National Academy of Sciences").

[59] Handler, *supra* note 46, at 807.

state both the cost and the benefits in quantitative form."[60]

Scientists like Dr. Handler well recognize that "knowledge of risks is rather imperfect and knowledge of benefits is likely to be decidedly less satisfactory and stated in quite different terms."[61] Nevertheless, as he contends, the effort to quantify risks and benefits in some terms must be made. "Providing adequate quantitative bases for public decision-making," Dr. Handler, agrees, "is a function of the appropriate segment of the scientific community."[62]

Recognizing again that precise quantification of benefits may not have been possible in the instant case, it is apparent nevertheless that the Secretary did not reach out to the scientific community in an attempt to obtain "the best available" estimate of benefits or the "the latest available scientific data in the field". To the contrary, as shown above, the Secretary instructed his own consultant not even to attempt such an estimate.

In sum, while it may not be attainable in every case, the principle that "[g]overnment regulation of technical products or processes must rest on a rational and sufficient scientific base"[63] should be established as a regulatory goal. As Dr. Handler has stated:

> If such numbers are not known, if one deals only with perceptions, values, judgments, and safety,

[60] *Id.* (emphasis added). In addition to Dr. Handler's personal views, the Committee discussed above recommended the use of more systematic and explicit analysis of environmental regulation decisions. Committee, National Academy of Sciences, *supra*, note 58, at 9-10.

[61] Handler, *supra* note 46, at 807.

[62] *Id.* at 811.

[63] *Id.* at 813.

> the . . . public interest cannot intelligently be served.[64]

The Secretary can hardly oppose the establishment of this regulatory objective, for he has previously endorsed the notion that "systematic" cost-benefit analysis is desirable in formulating OSHA standards. For example, in announcing a standard governing exposure to acrylonitrile, the Secretary first disclaimed a statutory obligation to estimate the benefits of the standard, but then conceded:

> This does not mean, however, that a systematic evaluation of costs and benefits is not to be encouraged within the limits of the estimation techniques.[65]

More directly, the Secretary has asserted to Congress that his standard governing exposure to cotton dust reflects his choice of the most cost-effective alternative.[66] In sum, the Secretary has previously conceded that the use of benefit analysis is compatible with the statute, that it is not beyond his capability, and that it will *not* delay the Secretary from protecting workers. To the contrary, he has asserted that such analysis has aided him in arriving at a proper, rational standard.

The Secretary's contradictory statements on the desirability of analyzing costs and benefits in promul-

[64] *Id.* at 811.

[65] 43 Fed. Reg. 457 (Oct. 3, 1978); BNA Occ. Safety and Health Reporter 612 (Oct. 5, 1978).

[66] United States Dep't of Labor, "Report to Congress—Cotton Dust: Review of Alternative Technical Standards and Control Technologies," 14, 65, 67, 82 (May 14, 1979).

gating OSHA standards have an additional, important consequence in this case. In determining the weight which it will give to an administrator's interpretations of the enabling statute under which he operates, this Court has said that:

> [t]he weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control.[67]

Here, the Secretary seeks the Court's deference to his judgment that the statute does not require an analysis of benefits, and that such analysis cannot be performed where carcinogens are involved. However, as shown, the Secretary's determination does not reflect a thorough analysis of the available scientific data and analytical techniques. To the contrary, it ignored them. Second, the Secretary's position here is inconsistent with positions he has espoused elsewhere. Third, his reasoning that the absence of a dose-response curve for benzene makes an analysis of benefits impossible and compels the lowest feasible level of exposure is invalid. As one commentator involved in risk regulation has stated:

> A determination of the 'as-low-as-practicable' limit on risk reduction is as arbitrary as a determination of the level of risk acceptance. Some other more stable reference is required to determine when risk reduction is cost-effective or when risk reaches an acceptable level.[68]

[67] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

[68] Kasper, *supra* note 31, at 962. Dr. Kasper is Deputy Assistant Administrator for Radiation Programs, United States Environmental Protection Agency.

In sum, the Secretary's interpretation of the Act here does not satisfy the requirements of *Skidmore*. Accordingly, the Court should decline to follow that interpretation.[69]

V. Conclusion

We have demonstrated that careful evaluation of the benefits to be derived from a safety or health standard is mandatory under the Act. Therefore, by failing to estimate the benefits of the standard, the Secretary did not evaluate all of the factors relevant to the decision before him, and his action was thus irrational and unreasonable under settled principles of administrative law. Also, his determination that such an analysis was impossible is unsupported by substantial evidence. His omission also violated the commands of OSHA, particularly those of Section 6(b)(5), which require, *inter alia,* that standards be based on the "best available evidence" and the "latest available scientific data in the field." Further, the Secretary's failure to provide the estimate of benefits means that his finding that the benefits of the standard "may be appreciable" is unsupported by substantial evidence.

We have further demonstrated that for this Court to condone the Secretary's failure to explore fully the issues before him would be to encourage comparable federal administrators to act similarly, thus weakening the administrative processes upon which society must rely to resolve complex technological issues. This would be a development which the nation could ill-afford.

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[69] *Skidmore* v. *Swift & Co., supra:* Accord: *General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141-43 (1976).

In sum, the actions of the Secretary in promulgating the instant standard governing exposure to benzene satisfy neither the law nor the public interest. For these reasons, we respectfully urge that the judgment of the Court below be affirmed.

Respectfully submitted,

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